Date: August 29, 1997

Case No.: 96-INA-388

In the Matter of:

ALBERTO'S MEXICAN RESTAURANT,
Employer

On Behalf Of:

JORGE ALBERTO CASTANO-RODRIGUEZ,
Alien

Appearance: Susan M. Jeannette, Immigration Processor
For the Employer/Alien

Before: Holmes, Huddleston, and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing

working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On February 22, 1994, Alberto's Mexican Restaurant ("Employer") filed an application for labor certification to enable Jorge Alberto Castano-Rodriguez ("Alien") to fill the position of Assistant Cook (AF 79-80). The job duties for the position are:

> Assistant cook for authentic Mexican restaurant with recipes passed through the family for generations. Must be able to use standard restaurant equipment and utensils. Able to prepare a wide range of Mexican foods including, tacos, tostados, burritos, rice, beans, chile releno, carnitas, carne asada, machacha etc. Garnish with lettuce, tomatoes, guacamole and salsa. This schedule allows for a thirty minute meal break. Responsible for scheduling within the shift in the absence of the main cook. Also, take over in the absence of the cook.

The requirements for the position are six years of grade school and two years of experience in the job offered or in a related occupation in a Mexican restaurant. Other Special Requirements are:

> Must speak Spanish, as the crew and the owners speak Spanish, and as well as a good percentage of the patrons, as the restaurant is 'authentic.' Must have Foodhandler's card.

On October 14, 1994, the Employer deleted the supervisory requirement (AF 65).

The CO issued a Notice of Findings on August 11, 1995 (AF 52-60), proposing to deny certification on the grounds that the Employer has failed to document: (1) its actual minimum requirements; (2) that the position is for a full-time employee, that there are no unlawful terms, and that the Employer can afford to pay the salary; (3) that the job is truly open to U.S. workers; and, (4) that a U.S. worker has been recruited in good faith and rejected for job-related reasons.

The CO asserted that the Employer's requirement of two years of experience as an assistant cook does not appear to meet its true minimum requirements in violation of 20 C.F.R. § 656.21(b)(5), because the Alien appears to have been provided this experience by the Employer after being hired. The CO also stated that:

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[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

> If the employer has employees who are not being paid reported wages, there may be unlawful terms of employment in violation of **20 CFR 656.20 (c) (7)**, which precludes labor certification. On the other hand, if the employer has workers who are not employees, being recognized as such, the job may not be a bona fide position for an employee as required by **20 CFR 656.3**. (Emphasis in original)

Accordingly, the Employer has not shown the ability to pay the offered wage as required by 20 C.F.R. § 656.20(c)(4), nor has it shown what hours will be worked, how often the work hours rotate, or how there will not be any overtime work hours.

Next, the CO stated that the Employer has not documented that the job opportunity is clearly open to any qualified U.S. workers as provided for in 20 C.F.R. § 656.20(c)(8). The CO questioned whether the Alien has been working for free as there is no record of paying wages to him, is related to an owner and, if so, whether the Employer would replace the Alien with a worker who required the offered salary of $7.00 per hour on a full-time basis. Finally, the CO determined that the Employer has not documented that either of the qualified U.S. applicants were rejected for lawful, job-related reasons as provided for in 20 C.F.R. § 656.21(b)(6).

Accordingly, the Employer was notified that it had until September 15, 1995, to rebut the findings or to cure the defects noted. The Employer requested an extension of time to rebut the Notice of Findings on September 6, 1995 (AF 51), and the CO granted this request on September 12, 1995 (AF 50), allowing the Employer until October 15, 1995, to file its rebuttal. The Employer requested a second extension of time on September 28, 1995 (AF 49), which the CO denied on October 11, 1995 (AF 48).

In its rebuttal, dated August 17, 1995 (AF 22-47), the Employer contended that she likes to "sponsor workers that have the two years previous experience with another Alberto's because this gives me a worker that is skilled and knows what he is doing when he steps into the kitchen." The Employer also stated that it would be "disasterous" to hire someone with less than two years of training as a cook. Further, the Employer asserted that the Alien was employed by a different Alberto's Restaurant for over two years and that he was paid "under the table" because he did not have a Social Security Number or legal status to work in the U.S. The Employer then stated that both U.S. applicants, Maria Jones and Humberto Sanchez, are now in her employ as manager and assistant manager, respectively.

Next, the Employer contended that she is paying wages to 52 employees, who each work at one of her five different restaurants, from $4.25 per hour to almost $10 per hour depending on their skill level. Accordingly, the Employer stated that she can "definitely afford" $7 per hour. The Employer listed the employees and schedule of work as of the date of filing the rebuttal.

The Employer then contended that her restaurants are sole proprietorships, owned by her, and that the Alien is not currently her employee, he is not related to her, and he has no ownership or control over the business. She stated that two other employees, Maria Jones and Humberto Sanchez, were hired even though neither showed up for their scheduled interview and she had to further pursue them.

The Employer also attached the following documents to the rebuttal: (1) statement from Roberto Morales; (2) DE6's; (3) schedule of workers; (4) list of labor certified Alberto's cases; (5) business license for Sanjuana Rodriguez; (6) San Diego Union newspaper article; (7) statement from Maria Jones; and, (8) statement from Humberto Sanchez.

The CO issued the Final Determination on December 4, 1995 (AF 18-21), denying certification because the Employer remains in violation of the regulations at 20 C.F.R. §§ 656.21(b)(6) and 656.21(b)(5). Specifically, the Employer has failed to rebut the CO's findings that U.S. workers were unlawfully rejected and that the requirement for two years of experience did not appear to represent the true minimum requirements. The CO determined that just because the Employer has found other jobs for two U.S. applicants, Mr. Sanchez and Ms. Jones, by referring them to another of her restaurants at some unspecified time after rejecting them for the instant position, does not remedy the failure to document that a good-faith effort was made to recruit these two applicants for the instant labor certification position. Additionally, the CO noted that work experience for the Alien remains undocumented by any payroll record or evidence of paid employment. Next, the CO determined that the Employer has failed to demonstrate how experience gained at another Alberto's Mexican Restaurant is truly experience gained elsewhere. Finally, the CO determined that the Employer has merely "expressed a preference without providing evidence to document that two years experience represents her true minimum requirements."

On December 19, 1995, the Employer requested reconsideration of the denial of labor certification (AF 2-17). The CO denied reconsideration on February 6, 1996 (AF 1), and in June 1996, forwarded the record to this Board of Alien Labor Certification Appeals ("BALCA" or "Board"). On June 25, 1996, the Employer filed a Petition to BALCA for Review of Denial of Certification.

Discussion

Section 656.21(b)(5) requires an employer to document either: (1) that the requirements it specifies for a job opportunity are its actual minimum requirements and the employer has not hired workers with less training or experience for jobs similar to the one offered; or, (2) that it is not feasible to hire workers with less training or experience than that required by the job offer. Thus, an employer violates § 656.21(b)(5) if it hired the alien with lower qualifications than it is now requiring and has not documented that it now is not feasible to hire a U.S. worker without that training or experience. *Capriccio's Restaurant*, 90-INA-480 (Jan. 7, 1992); *Office-Plus, Inc.*, 90-INA-184 (Dec. 19, 1991); *Gerson Industries*, 90-INA-190 (Dec. 19, 1991). The purpose of this section is to prevent employers from requiring more stringent qualifications of a U.S. worker than it requires of the alien. The employer may not treat the alien more favorably than it would a U.S. worker. *ERF Inc., d/b/a Bayside Motor Inn*, 89-INA-105 (Feb. 14, 1990).

In this case, the CO, in accordance with § 656.21(b)(5), instructed the Employer to document that its requirement for two years of experience for the job opportunity represents the Employer's actual minimum requirements for the job opportunity (AF 53-54). Specifically, the CO questioned whether the Alien has the requisite two years of experience and, if so, whether he gained such experience while employed by a different employer. Accordingly, the CO instructed

the Employer to delete the experience requirement or to provide evidence that the Alien gained two years of experience with a different employer or to provide evidence that it is not now feasible to hire an individual with less than two years of experience.

In rebuttal, the Employer stated that the Alien gained his qualifying experience while working for Roberto Morales (AF 22). She further stated that the Alien was paid "under the table" while he worked for Mr. Morales. In support of this contention, the Employer included a statement from Mr. Morales indicating that the Alien worked for him from February 1991 through April 1993 (AF 29). The statement, written in English, further notes that Mr. Morales does not speak English. In addition, the Employer stated that she has submitted "many, many cases for other aliens and so have other Alberto's restaurant owners. Never have we been panned because a worker has worked at another restaurant prior to my sponsoring them." The Employer included a list of applications that were certified (AF 39).

In order to prove that the alien gained his qualifying experience with a different employer, the employer must demonstrate that its ownership and control are separate and distinct from the company where the alien gained his qualifying experience. *Salad Bowl Restaurant t/a Ayhan Brothers Food, Inc.*, 90-INA-200 (May 23, 1991). Even if the companies are not owned or controlled by the same individuals, the employer may have to show a "distinct operational independence" between the two entities. *Obro Ltd.*, 90-INA-51 (Feb. 21, 1991) (employer may not play "musical employees" to bypass labor certification requirements). In this case, we find that the Employer has not demonstrated that the Alien acquired his alleged experience while working for a separate entity.

The Employer has only submitted an undocumented statement from Roberto Morales indicating that the Alien worked for him from February 1991 until April 1993. However, we find that this statement is insufficient for several reasons. First, we note that the Alien's statement of work history states that he gained his alleged experience while working at an Alberto's Restaurant in Carlsbad, California (AF 123). However, Mr. Morales' statement only indicates that he owns restaurants in San Diego and Costa Mesa (AF 29). Notwithstanding this inconsistency, there is no independent documentation showing that Mr. Morales owned the restaurant where the Alien gained his experience during the dates alleged. Finally, we note that the statement signed by Mr. Morales is written in English; however, it states that Mr. Morales does not speak English. Thus, we question whether Mr. Morales even understood what he was signing. Although a written assertion constitutes documentation that must be considered under *Gencorp*, 87-INA-659 (Jan. 13, 1988) (*en banc*), a bare assertion without supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof. Accordingly, we find that the Employer has not submitted sufficient proof that the restaurant where the Alien allegedly gained his experience was a separate and distinct entity at that time.[2] In addition, we note that separate applications for labor certification have no precedential value and, therefore, are not relevant to this discussion.

[2] Moreover, in view of the findings made herein, we do not decide whether experience gained while an alien does not have legal status to work in this Country can be used as proof of requisite experience.

Accordingly, we find that the Employer is in violation of § 756.21(b)(5) and the CO's denial of labor certification is hereby AFFIRMED.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel:

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RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decision; and, **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.